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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/618,971
Filing Date: July 14, 2003
Appellant(s): DIBBS, RICHARD J.

Douglas J. McEvoy
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 05, 2006 appealing from the Office action mailed May 05, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,078,120	HWANG	1-1992
6,113,961	POLSTER	9-2000
6,455,094	BALL ET AL	9-2002
4,079,666	PLEMONS ET AL	3-1978
3,830,945	SCHARFMAN	8-1974

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 50, 52-54, 87 are rejected under 35 U.S.C. 102(b) as being anticipated by Hwang (US 5,078,120). Hwang discloses a cooking oven for slow cooking of food products comprising a spiral oven (figure 1) configured or capable to increase a temperature to a first predetermined temperature for a predetermined time interval (col. 9, lines 37-40).

NOTE: "Expressions relating the apparatus to contents thereof during an intended operation are no significance in determining patentability of the apparatus claim". *Ex parte Thibault*, 164 USPQ 666, 667 (Bd. App. 1969). Furthermore, "Inclusion of material or article worked upon by a structure being claimed does not impart patentability to the claims". *In re Young*, 25 USPQ 69 (CCPA 1935) (as restated in *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). In this case, in-shell egg is considered material or article worked upon which does not limit apparatus claims, therefore no patent weight is given to these claims.

2. Claims 56, 89-91, 94, 102, 105-106 are rejected under 35 U.S.C. 102(b) as being anticipated by Polster (US 6,113,961). Polster discloses a grader configured to grade the in-shell egg (col. 2, lines 26-33), an oven configured to increase a temperature of an in-shell egg to a first predetermined temperature in a range of between 1200F and 1400F for a predetermined time interval (col. 10, lines 51-54), a packer configured to pack the in-shell egg (col. 14, lines 62-65).

NOTE: "Expressions relating the apparatus to contents thereof during an intended operation are no significance in determining patentability of the apparatus claim". *Ex parte Thibault*, 164 USPQ 666, 667 (Bd. App. 1969). Furthermore, "Inclusion of material or article worked upon by a structure being claimed does not impart patentability to the claims". *In re Young*, 25 USPQ 69 (CCPA 1935) (as restated in *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). In this case, as long as Polster's reference having a cavity capable "to increase a temperature of an in-shell egg in a non-batch manner to an elevated temperature for a time interval" that will meet the claimed limitation. The term "to increase a temperature of an in-shell egg in a non-batch manner to an elevated temperature for a time interval" is considered an intended use; therefore no patent weight is given to the term.

3. Claims 51, 55, 101 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hwang (US 5,078,120) in view of Ball et al (US 6,455,094). Hwang discloses substantially all features of the claimed invention except a cooler arranged downstream of the oven and configured to reduce the temperature to a second predetermined

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temperature in a range between 45⁰F and 75⁰F. Ball discloses a cooler arranged downstream of the oven and configured to reduce the temperature to a second predetermined temperature in a range of between 45⁰F and 75⁰F (col. 8, lines 58-65 and col. 7, lines 14-18). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Hwang a cooler arranged downstream of the oven and configured to reduce the temperature to a second predetermined temperature in a range of between 45⁰F and 75⁰F as taught by Ball et al in order to reduce the temperature of the object after the pasteurization process.

4. Claim 86 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hwang (US 5,078,120) in view of Plemons et al (US 4,079,666). Hwang discloses substantially all features of the claimed invention except a spiral cooler arranged downstream of the oven. Plemons discloses a spiral cooler (70) arranged downstream of the oven (Figure 3, col. 5, lines 1-6 and col. 4, lines 55-59). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Hwang, a spiral cooler arranged downstream of the oven as taught by Plemons in order to reduced the temperature of the in-shell egg to a second temperature.

5. Claims 88, 92, 97 are rejected under 35 U.S.C. 103(a) as being unpatentable over Polster (US 6,113,961) in view of Ball et al (US 6,455,094) cited by applicant. Polster discloses substantially all features of the claimed invention except a cooler arranged downstream of the oven and configured to reduce the temperature to a second predetermined temperature in a range between 45⁰F and 75⁰F. Ball discloses a cooler arranged downstream of the oven and configured to reduce the temperature to a

second predetermined temperature in a range of between 45⁰F and 75⁰F (col. 8, lines 58-65 and col. 7, lines 14-18 and col. 14, lines 63-67 and col. 15 lines 1-10). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Polster a cooler arranged downstream of the oven and configured to reduce the temperature to a second predetermined temperature in a range of between 45⁰F and 75⁰F as taught by Ball et al in order to reduce the temperature of the object to a second temperature.

6. Claim 93 is rejected under 35 U.S.C. 103(a) as being unpatentable over Polster (US 6,113,961) in view of Plemons et al (US 4,079,666). Polster discloses substantially all features of the claimed invention except a spiral cooler arranged downstream of the oven. Plemons discloses a spiral cooler (70) arranged downstream of the oven (Figure 3, col. 5, lines 1-6 and col. 4, lines 55-59). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Polster, a spiral cooler arranged downstream of the oven as taught by Plemons in order to reduced the temperature of the in-shell egg to a second temperature.

7. Claims 95, 100, 103 and 107-109 are rejected under 35 U.S.C. 103(a) as being unpatentable over Polster (US 6,113,961) in view of Hwang (US 5,078,120). Polster discloses substantially all features of the claimed invention except the temperature increasing cavity includes a spiral oven. Hwang discloses a temperature increasing cavity (12) includes a spiral oven (Figure 1). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Polster

temperature increasing cavity includes a spiral oven as taught by Hwang in order to pasteurized plurality of objects at the same time while passing through the oven.

8. Claim 96 is rejected under 35 U.S.C. 103(a) as being unpatentable over Polster (US 6,113,961) in view of Scharfman (US 3,830,945). Polster discloses substantially all features of the claimed invention except the temperature increasing cavity comprises a microwave oven. Scharfman discloses a temperature increasing cavity (12) comprises a microwave oven (col. 2, lines 47-50). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Polster temperature increasing cavity comprises a microwave oven as taught by Scharfman in order to have a high heating temperature in a short time.

9. Claim 104 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hwang (US 5,078,120) in view of Scharfman (US 3,830,945). Hwang discloses substantially all features of the claimed invention except the oven further comprises a microwave generating oven. Scharfman discloses an oven (12) further comprises a microwave generating oven (col. 2, lines 47-50). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Hwang an oven further comprises a microwave generating oven as taught by Scharfman in order to have a high heating temperature in a short time.

(10) Response to Argument

Group I-claims 50, 52-54 and 87

Applicant argues "First, and notwithstanding the general reference to varied food items, Hwang nowhere teaches or suggests pasteurizing in-shell eggs. Second, the act

cooking as disclosed in Hwang is not present invention". The Examiner disagrees. Hwang meets all the claimed limitations such as a spiral oven (figure 1) and the spiral oven configured to increase a temperature to a first predetermined temperature for a predetermined time interval (col. 9, lines 37-40). Further, the recitation "in-shell egg pasteurization system" has not been given patentable weight because it has been held that a preamble is denied the effect of a limitation where the claim is drawn to a structure and the portion of the claim following the preamble is self-contained description of the structure not depending for completeness upon the introductory clause. Since the pasteurizing in-shell eggs is not included in the claimed limitations, therefore, Hwang is anticipated the claimed limitations.

Group II-claims 56, 89-91,94,102 and 105-106

Applicant argues "claim 56 recites a non-batch egg pasteurization system employing a pasteurizing cavity prior to a packer. Polster nowhere teaches or suggests non-batch pasteurization in any fashion. To the contrary, the incorporation of individual flats (i.e., plural egg-holding trays) militates against the possibility of any type of non-batch process, which Applicant understands to be the "successive" treatment of in-shell eggs in a progressing fashion. The Examiner disagrees. In claim 56, the claimed limitation such as "a cavity configured to increase a temperature of an in-shell egg in a non-batch manner to an elevated temperature for a time interval". It has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. In this case, the term "to increase a

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temperature of an in-shell egg in a non-batch manner” is considered an intended use; therefore no patent weight is given to the term. Therefore, as long as Polster’s reference having a cavity capable “to increase a temperature of an in-shell egg in a non-batch manner to an elevated temperature for a time interval” that will meet the claimed limitation.

Applicant further argues that claim 56 does not recite grading. The Examiner disagrees. Polster discloses a grader configured to grade the in-shell egg (col. 2, lines 26-33).

Applicant also argues “Nowhere does Polster disclose packing...” . Polster disclosed packing in column 14, line 65.

Group III-claims 51, 55 and 101

Applicant argues that Ball was combined with Hwang, which Ball does not teach or suggest a cooler arranged downstream from a pasteurizing oven. The Examiner disagrees. Hwang discloses substantially all features of the claimed invention except a cooler arranged downstream of the oven and configured to reduce the temperature to a second predetermined temperature in a range between 45°F and 75°F. Ball discloses a cooler arranged downstream of the oven and configured to reduce the temperature to a second predetermined temperature in a range of between 45°F and 75°F (col. 8, lines 58-65 and col. 7, lines 14-18). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Hwang a cooler arranged downstream of the oven and configured to reduce the temperature to a second predetermined temperature in a range of between 45°F and 75°F as taught by Ball et al

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in order to reduce the temperature of the object after the pasteurization process.

Further, the examiner recognizes that references cannot be arbitrarily combined and that there must be some reason why one skilled in the art would be motivated to make the proposed combination of primary and secondary references. However, there is no requirement that a motivation to make the modification be expressly articulated. The test for combining references is what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. References are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures.

Group IV-claim 86

Applicant argues "Plemons, just as Hwang, has nothing to do with either pasteurizing or in-shell eggs. The Examiner disagrees. The combination of Hwang and Plemons for the rejection is good, since "pasteurizing or in-shell eggs" is considered an intended use and is not a part of the claimed limitations. Further, applicant also argues that no suggestion to combine between Hwang and Plemons' references. The Examiner disagrees. Hwang discloses substantially all features of the claimed invention except a spiral cooler arranged downstream of the oven. Plemons discloses a spiral cooler (70) arranged downstream of the oven (Figure 3, col. 5, lines 1-6 and col. 4, lines 55-59). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Hwang, a spiral cooler arranged downstream of the oven as taught by Plemons in order to reduced the temperature of the in-shell egg to a second temperature. Further, the examiner recognizes that references cannot be arbitrarily combined and that there must be some reason why one skilled in the art

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would be motivated to make the proposed combination of primary and secondary references. However, there is no requirement that a motivation to make the modification be expressly articulated. The test for combining references is what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. References are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures.

Group V-claims 88, 92 and 97

Applicant argues "there is no item 70 in Ball (it is suspected that the reference to Plemons was intended). Furthermore, the general technical description of cooling eggs as taught in Ball does not support the holding of obviousness based upon Ball providing a downstream located cooler. The Examiner is apologized for the typo error of such item 70. However, Ball disclosed a cooler arranged downstream of the oven and configured to reduce the temperature to a second predetermined temperature in a range of between 45⁰F and 75⁰F (col. 8, lines 58-65 and col. 7, lines 14-18 and col. 14, lines 63-67 and col. 15 lines 1-10). Further, the examiner recognizes that references cannot be arbitrarily combined and that there must be some reason why one skilled in the art would be motivated to make the proposed combination of primary and secondary references. However, there is no requirement that a motivation to make the modification be expressly articulated. The test for combining references is what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. References are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures.

Group VI-claim 93

Applicant argues “a lack of support in maintaining this rejection. Again noting the deficiencies in the individual references discussed above”. The examiner recognizes that references cannot be arbitrarily combined and that there must be some reason why one skilled in the art would be motivated to make the proposed combination of primary and secondary references. However, there is no requirement that a motivation to make the modification be expressly articulated. The test for combining references is what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. References are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures.

Group VII-claims 95, 100, 103 and 107-109

Applicant argues “This is essentially a “mix and match” or “grab bag” rejection, wherein the Examiner is combining the batch pasteurization of Polster with the poultry product cooking oven in Hwang and merely stating the obviousness of modifying Polster to permit pasteurizing a plurality of objects at the same time while passing (them) through the oven”. The Examiner disagrees. Polster discloses the batch pasteurization with substantially all features of the claimed invention except the temperature increasing cavity includes a spiral oven. Hwang discloses a temperature increasing cavity (12) includes a spiral oven (Figure 1). It would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize in Polster temperature increasing cavity includes a spiral oven as taught by Hwang in order to pasteurized plurality of objects at the same time while passing through the oven. Further, Hwang’s

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reference, in this case, is only cited for the missing limitation of the temperature increasing cavity includes a spiral oven. Polster and Hwang are both related to the heating oven, thus they are considered as the same field in the art. Therefore, one in ordinary skill in the art would look into and combine them.

Group VIII-claim 96

Applicant argues "Neither reference teaches or suggests the microwave oven of claim 96 in cooperation with the non-batch system of claim 56 including the subsequent packer. Again, neither Polster nor Scharfman teach a packer at any step of the system". The Examiner disagrees. The term "in non-batch manner", in claim 56, is considered an intended use; therefore, no patentable weight is given to that term. Further, Polster disclosed packing in column 14, line 65.

Group IX-claim 104

Applicant argues "The rejection combines the egg microwave cooker of Scharfman with the meat/poultry cooking oven of Hwang, and as supporting the application of a microwave oven (claim 104) into the spiral oven based egg pasteurization system of claim 50. Once more, it is not seen how the microwave precooking/sterilizing device of Scharfman suggests application to the spiral poultry cooker in Hwang". The Examiner disagrees. First, the term "egg pasteurization system", in claim 50, is considered an intended use; therefore, no patentable weight is given to that term. Second, Hwang discloses substantially all features of the claimed invention except the oven being a microwave generating oven. Scharfman discloses an oven (12) being a microwave generating oven (col. 2, lines 47-50). It would have been

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obvious to one having ordinary skill in the art at the time the invention was made to utilize in Hwang an oven further comprises a microwave generating oven as taught by Scharfman in order to have a high heating temperature in a short time. Further, Scharfman, in this case, is only cited for the missing limitation of the oven being a microwave generating oven. Hwang and Scharfman are both related to the heating oven, thus they are considered as the same field in the art. Therefore, one in ordinary skill in the art would look into and combine them.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Quang T. Van

Conferees:

Gregory M. Vidovich, Supervisory Patent Examiner

Robin Evans, Supervisory Patent Examiner

